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281-908—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 722

CAPTAIN DALE E. NOYD

v.

HONORABLE ROBERT S. MCNAMARA, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner has been an Air Force officer since 1955, and has been trained by the Air Force as a fighter pilot. In return for Air Force financing of several years of graduate study, he committed himself to serve until June 1969. He brought this action in the United States District Court for the District of Colorado to compel the Air Force either to accept his resignation or to assign him exclusively to non-combat duties, on the ground that he has developed conscientious objection to American participation in the Vietnam conflict. Petitioner applied through Air Force channels for separation from the service under Air Force Regulation AFR 35–24, which provides that the Air Force will, "to the extent practicable and equitable," recognize "bona fide religious objection to participation in

war, in any form" on the part of a member of the Air Force, AFR 35-24, Section A, para. 2(b). His application stated that he would "support the use of force by a nation, or preferably the community of nations, in the defense of a nation whose integrity and existence is threatened by an external aggressor—and when all peaceful attempts at conflict resolution have proved futile" (Pet. App. 9a, n. 6). Petitioner declared, however, that the war in Vietnam is "unjust and immoral" and that he could not participate in the war or contribute to it. *Ibid.* The application under this regulation was rejected by the Secretary of the Air Force. Shortly thereafter, petitioner received orders assigning him to the 27th Tactical Figher Wing, Cannon Air Force Base, New Mexico, for training in F-100 jet fighter aircraft. As the district court noted, "[t]his aircraft is currently being used in Vietnam, and the probability is strong that anyone receiving training at Cannon can anticipate transfer to the zone." 267 Supp. at 705 (Pet. App. 10a).

The district court stayed petitioner's assignment to combat training or to duties that might conflict with his conscience pending a full hearing (Pet. App. 1a–3a), but after receiving petitioner's evidence on the merits, the court dismissed the complaint on the ground that, since petitioner had voluntarily subjected himself to the military establishment and had for eleven years availed himself of its benefits, he was required to pursue the military processes, including possible court-martial proceedings, before presenting his claims to the civil courts. 267 F. Supp. 701 (Pet. App. 4a–18a). The court of appeals affirmed for the

same reason. 378 F. 2d 538 (Pet. App. 19a–22a). On June 5, 1967, Mr. Justice White, after consultation with the Court, denied petitioner's application for a stay of mandate.

The subsequent occurrences, while not a part of the record, have been accurately summarized by petitioner (Pet., pp. 16–19). Petitioner filed another application for separation under AFR 35–24; this was denied by the Secretary of the Air Force although it had received a favorable recommendation from petitioner's commanding officer at Cannon AFB. Thereafter, petitioner was ordered to take training as an instructor pilot at Cannon, where he is presently undergoing this training. We are advised that it will be completed some time between November 15 and November 30, 1967. Although no decision has yet been made as to what orders petitioner will receive, if he successfully completes the course and is assigned as an instructor pilot, his new duties would begin within a few days after completion of his training.

DISCUSSION

1. *Relationship between the civil courts and the armed forces.* The comprehensive issue posed by the questions petitioner raises (Pet. 3–4) is whether a military officer is entitled to resort to the civil courts for extraordinary relief while there still remain appropriate channels for presenting his claims within the armed services. Petitioner invokes the power of an equity court to compel the military authorities to alter their assessment of his status within the Air Force and to assign him to duties compatible with his opposition

to military operations in Vietnam. It seems clear, however, that if and when petitioner is actually confronted with an order and charged with disobedience of it, he will have the opportunity to present his defenses within the traditional framework of court-martial procedures, review boards, resort to the service Secretary, and request for relief from the Court of Military Appeals. If his contentions fail, and if they relate to fundamental rights, it would then be appropriate to test them in the civil courts by petition for habeas corpus. Only at that point, we submit, does the role of the civil courts come into play. Intervention by injunctive relief at the present stage would be unprecedented and would embroil the federal judiciary in the military processes in circumstances where there is no indication that the military channels will fail to provide fair consideration of the claims. See *Levy* v. *Corcoran* (C.A.D.C. No. 20972, May 9, 1967) (opinion of Leventhal, J.), No. 576, certiorari denied, November 13, 1967.

The courts have invariably refused to interfere in the internal affairs of the military by issuance of mandates intended merely to obviate exposure to court-martial or to anticipate the results of a court-martial. *Wales* v. *Whitney,* 114 U.S. 564; *Gusik* v. *Schilder,* 340 U.S. 128. *Cf. Orloff* v. *Willoughby,* 345 U.S. 83, 94–95.[1] This precept is especially appropriate in a situation involving the assignment of a career

[1] Even when there is no question of interference with military jurisdiction, it is a "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions." *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163.

military officer to combat-related duty for which he has been trained. To permit judicial review of such an assignment would strike at the core of military discipline and order.[2] Petitioner's reliance on cases such as *Toth* v. *Quarles*, 350 U.S. 11, and *Reid* v. *Covert*, 354 U.S. 1, is misplaced, since they involved persons who, unlike petitioner, were not in the service and contested the underlying jurisdiction of the military to apply military law to them. By the same token, cases which permit a Selective Service registrant to submit to induction and immediately file a petition for habeas corpus to test the legality of the induction, without risking criminal punishment (*Reel v. Badt*, 152 F. 2d 627 (C.A. 2); *Samuels* v. *Pearson*, 151 F. 2d 801 (C.A. 3); *Levy* v. *Cain*, 149 F. 2d 338 (C.A. 2)) are far removed from the situation of a man who lawfully accepted an Air Force commission twelve years ago and now seeks to contest his assignment to duty.

The fact that the Air Force applies the same substantive tests in determining the claim of a person already in the military service that he is a conscientious objector as the Selective Service System applies to a civilian registrant[3] hardly suggests that similar

[2] In *Overseas Media Corp.* v. *McNamara* (C.A.D.C. No. 20590, Oct. 3, 1967), cited by petitioner for the proposition that constitutional limits apply even to the war power, the court of appeals nevertheless recognized that the "power of the armed services to make their dispositions of men and materiel * * * does not admit of fragmentation" (slip op. p. 10).

[3] See AFR 35-24, Section A, para. 3a (Pet. App. 24a); *United States* v. *Gearey*, 368 F. 2d 144, 149-50, notes 10-11 (C.A. 2).

provisions for judicial review must be available. Compelling practical considerations demonstrate the propriety of precluding immediate civil litigation. Once a man has volunteered for pilot training, as did petitioner, the Air Force should be able to consider him immediately available for assignment to combat-related duty, without any necessity to litigate in the federal courts. Although this Court in *Orloff* v. *Willoughby*, 345 U.S. 83, did not discuss the exhaustion-of-remedies question in that case, its holding that the civil courts have no jurisdiction to revise the duty orders of a man lawfully in the service takes account of the factors that are pertinent here:

> Nothing appears to convince us that he is held in the Army unlawfully, and, that being the case, we cannot go into the discriminatory character of his orders. * * * The effect of entertaining a proceeding for judicial discharge from the Army is shown from this case. Orloff was ordered sent to the Far East Command, where the United States is now engaged in combat. By reason of these proceedings, he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place. It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities. [345 U.S. at 94–95.]

The consequences of judicial interference with the assignment of trained military personnel obviously

distinguishes the instant case from cases where courts have undertaken to review the legality of a Selective Service classification either before or immediately after induction.

Petitioner relies heavily on *Dombrowski* v. *Pfister*, 380 U.S. 479, but that decision in no way advances his attempt to bypass the court-martial procedure. *Dombrowski* rests on the proposition that in certain narrowly defined circumstances the federal courts have power to enjoin State prosecutions. See *Ex parte Young*, 209 U.S. 123. Wholly discrete problems are presented by petitioner's endeavor to secure the intervention of the federal judiciary in controlling his military assignment. *Dombrowski*, moreover, involved an overly broad and vague statute regulating free expression. 380 U.S. at 490–94. As this Court pointed out, if the federal courts did not intervene a series of State criminal prosecutions would have been required in order to delineate the legitimate scope of the statute on a case-by-case basis, and the uncertainties inherent in this process would have had a "chilling effect" on activity to which the statute could not constitutionally be applied. 380 U.S. at 487, 490–91. There is no analogy here: the applicability of AFR 35–24 to a person who objects to a particular war (rather than to war in any form), together with any attendant constitutional issues, can readily be decided in a single court-martial proceeding, without the continuing uncertainty that distinguished *Dombrowski*.[*]

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[*] Whether or not the court of appeals was correct in assuming that a court-martial would deem the Air Force's refusal

2. *"Discriminating pacificism"*[5] *as a basis for conscientious objector status.* In light of our contention that petitioner's suit is premature, we think it unnecessary for the Court to proceed further in order to dispose of the case. In addition, however, we suggest that none of the grounds for petitioner's prayer for injunctive relief would entitle him to prevail on the merits. His fundamental position is that the Air Force is not permitted, under AFR 35-24,[6] to distinguish between servicemen who object to participation in war in any form and those who disagree with a particular war. Such a distinction simply reflects the fundamental proposition that it is the responsibility of the President and Congress, rather than the individual soldier, to decide whether the nation should engage in a particular war. Contrary to petitioner's suggestion, this does not involve the slightest inconsistency with *United States* v. *Seeger*, 380 U.S.

(if improper) to permit petitioner to resign a justification for his refusal to obey an order is not crucial. The judgment of the court-martial would, of course, be subject to review, including the possibility of review in the civilian courts by habeas corpus. At all events, the result reached by the court of appeals in the instant case is clearly correct in view of the plain lack of merit of petitioner's case on the merits (see points 2-4, below).

[5] The term signifies that the individual is willing to participate in any particular war only after he personally appraises its "total character," his estimates of its causes, objects, geography, and the nations which are parties to it (Pet. 30).

[6] This regulation (Pet. App. 23a-27a) is the basic guide for determining who may be classified as a conscientious objector after becoming a member of the Air Force. Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j) (Pet. 5-7), deals specifically only with pre-induction conscientious objector claims.

163, involved the requirement that conscientious objection must be based on "belief in a relation to a Supreme Being." 50 U.S.C. App. 456(j). No question is raised here as to petitioner's belief in a Supreme Being; rather, the issue is whether that belief has led him to object to participation in war, in any form.

Nor is there any conflict with *Sicurella* v. *United States,* 348 U.S. 385, and similar cases cited by petitioner (Pet. 32, n. 22). Readiness to fight in "theocratic wars" commanded by Jehovah, to fight at Armageddon, or to use violence in self-defense and in defense of their homes, family, and associates, it was held, did not disqualify Jehovah's Witnesses from obtaining conscientious objector status. That conclusion is based on the fact "that Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets." *Sicurella* v. *United States,* 348 U.S. 385, 391.[7] Petitioner, unlike the

[7] This Court in *Sicurella* further commented (348 U.S. at 389–91):

> [P]etitioner emphasized that the weapons of his warfare were spiritual, nor carnal. * * * With reference to the defense of his ministry, his brethren and Kingdom interests, he asserted that "we do not arm ourselves or carry carnal weapons * * *. I do not use weapons of warfare in defense * * * of Kingdom interests * * *." [T]hese statements make it clear that petitioner's defense of "Kingdom Interests" has neither the bark nor the bite of war as we unfortunately know it today. * * *
>
> * * * Granting that * * * Jehovah's Witnesses [are] antipacifists, extolling the ancient wars of the Israelites and ready to engage in a "theocratic war" if Jehovah so commands them, and granting that the Jehovah's Witnesses

Jehovah's Witnesses, does insist that he has the right individually to judge the merits of this country's participation in particular "actual military conflicts between nations of the earth in our time." Neither Congress nor the Executive nor this Court has recognized this view as entitling its holder to conscientious objector status, and the Constitution does not require that this form of pacifism be accorded such status.

3. *Absence of an adversary hearing.* Petitioner's contention that the lack of an adversary hearing at the administrative level denied him due process is without merit. There were no contested issues of fact in this case—only the legal question of status. The Air Force's denial of petitioner's claim to conscientious objector status was based on his own statements regarding the types of war to which he objects, and there is no indication that the Air Force relied on any other evidence. In the circumstances, an adversary hearing was neither required nor appropriate.

4. *Air Force compliance with its procedures.* Nor

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will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons.

is there any substance to petitioner's argument that the Air Force failed to comply with its own regulations, because the forwarding indorsement of his commander did not state the reason for the commander's recommendation that petitioner's application be disapproved. In the circumstances of this case, the reasoning behind the commander's statement that petitioner's application "does not meet the requirements of AFR 35–24" (Pet. 40) is obvious. Petitioner himself recognizes that it is readily apparent why the Air Force denied his applications (Pet. 27–28). Accordingly, no purpose would be served by requiring a further statement of reasons, and this issue certainly does not warrant review by this Court. Moreover, any defect in the commander's statement of reasons has been cured by the subsequent proceedings in connection with petitioner's last application. As petitioner points out (Pet. 17–18), his new commanding officer forwarded this application with a favorable recommendation accompanied by a detailed statement of his reasons.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

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